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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

SAFE HARBOR WATER POWER CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 27, 1950.

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Petitioner, Safe Harbor Water Power Corporation, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on December 30, 1949.

Opinions Below

The opinions of the Federal Power Commission are found at R. 2727-2795. The opinion of the Court of Appeals (R. 4565-4601) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on December 30, 1949 (R. 4602). The jurisdiction of this

court is invoked under Section 1254(1) of the Judicial Code (62 Stat. 928, 28 U.S.C. 1254) and Section 313(b) of the Federal Power Act (49 Stat. 838, 16 U.S.C. 825).

Questions Presented

The primary question presented is:

> Do the general regulatory provisions of Part II of the Federal Power Act of 1935, which on its face deals only with the regulation of certain "public utilities" engaged in interstate commerce, authorize the Federal Power Commission to regulate the rates of Safe Harbor Water Power Corporation, a "licensee" under Part I of the Act, and the holder of a license contract issued by the Federal Power Commission in 1930 under the Federal Water Power Act of 1920 (now reenacted as Part I of the Federal Power Act of 1935) which provides for the regulation of the licensee's rates exclusively in accordance with the provisions of Section 20 of Part I of the Act—*i.e.* in the first instance by agreement between the states concerned and by the Federal Power Commission only if such states cannot agree?

If it shall be determined that the jurisdiction of the Federal Power Commission to regulate the rates of licensees is limited to the authority contained in Part I of the Act, further questions arise.

(1) Does Section 20 of the Federal Power Act require that in the regulation of the rates of licensees the rate base employed shall be the "net investment" of the licensee as that term is defined in Section 3(13) of the Federal Power Act, unless such "net investment" shall exceed the "fair value"?

(2) Did the Federal Power Commission correctly apply the formula set forth in Section 3(13) of the Act in determining the "net investment" of petitioner?[1]

(3) Is the statutory requirement of Section 20 of Part I of the Act, that the Federal Power Commission shall have jurisdiction to regulate the interstate rates of licensees only in the event the states concerned are unable to agree, met by the mere failure of the State of Maryland to attempt to engage in cooperative effort with the State of Pennsylvania on the asserted ground that regulation by the Federal Power Commission may be more expedient?

Statutes Involved

The pertinent provisions of Sections 3(13), 14 and 20 of Part I of the Federal Power Act of 1935 and the pertinent provisions of Sections 205 and 206 of Part II of the Federal Power Act of 1935 are set forth in Appendix A (*infra*, pp. 23-26).

Statement

Safe Harbor Water Power Corporation, a Pennsylvania corporation, owns and operates a hydroelectric plant on the Susquehanna River, near Lancaster, Pennsylvania, under a 50-year license issued in 1930 by the Federal Power Commission (R. 3491-3543). Its electric output is sold at wholesale for resale by others in the states of Maryland and Pennsylvania.

Article 1 of petitioner's license (R. 3493) provides in part: "This license is issued for a period of Fifty (50)

[1] The Court below failed to decide this question (R. 4588-89).

years from the date hereof, and in consideration of such license and the benefits and advantages accruing thereunder to the Licensee it is expressly agreed by the Licensee that the entire project * * * shall be subject to all the terms and conditions of this license, including the terms and conditions of the Act and of the rules and regulations of the Commission pursuant thereto and made a part of this license".

Petitioner's license was issued under the authority of the Federal Water Power Act of 1920. That Act has since been reenacted as Part I of the Federal Power Act of 1935, with certain amendments that are of no significance here. The Act, moreover, as originally written and as reenacted in 1935, although reserving in Section 28 the right of alteration, amendment or repeal, contains the provision "* * * but no such alteration, amendment, or repeal shall affect any license theretofore issued under the provisions of this Act, or the rights of any licensee thereunder".

Section 20 of the Act, which now appears in Part I, confers jurisdiction upon the Federal Power Commission to regulate the rates charged by licensees for power entering into interstate or foreign commerce only in the event that any of the states directly concerned has not provided a commission to regulate such rates or the properly constituted authorities of the states are unable to agree thereon. Section 20 further provides that the valuation of a licensee's property for ratemaking purposes shall not be in excess of the value or values prescribed in Section 14 of the Act for the purposes of purchase by the United States at the expiration of the license period. The standard set forth in Section 14 is "net investment" as defined in Section 3(13) of the Act, or fair value, whichever is the lower. The Commission has heretofore construed Section 20 to require a "net investment" base.

Part II of the Federal Power Act, enacted some five years after the issuance of petitioner's license, authorizes the Federal Power Commission to regulate the interstate wholesale rates of certain electric utilities, but limits the Commission's regulatory powers "to those matters which are not subject to regulation by the States" (Section 201(a)). It does not in terms fix any basis of valuation for ratemaking purposes other than that which the Commission may properly require (cf. Section 208).

This is the second attempt by the Federal Power Commission to regulate petitioner's rates. On November 9, 1937 the Commission instituted rate proceedings and, after hearings, issued an order on June 11, 1940 requiring petitioner to reduce its rates by approximately $350,000 annually. In that proceeding the Commission expressly relied upon the regulatory powers over licensees conferred upon it by Part I of the Act, although it made no finding that the states of Maryland and Pennsylvania had been unable to agree. The United States Circuit Court of Appeals for the Third Circuit held that disagreement of the states was a prerequisite to the exercise of the Commission's authority and set aside the rate order for want of the necessary jurisdictional finding (124 F. 2d, 800). This Court denied the Commission's petition for certiorari (316 U. S. 663).

On September 1, 1944, the Commission issued a second order instituting the instant rate proceeding. Hearings were held during 1944 and 1945 and, on October 25, 1946, the Commission issued its opinion and order reducing petitioner's rates approximately $627,000 annually (R. 2727-90, 2796-2804). In the findings accompanying its opinion and order, the Commission found that the states of Maryland and Pennsylvania were unable to agree on the regulation of petitioner's rates and that, therefore, the

Commission had regulatory authority over petitioner, a licensee, under Section 20 of the Federal Power Act (R. 2796-98). It also found that petitioner was a "public utility" as that term is defined in Part II of the Federal Power Act, and consequently was subject to the Commission's regulatory powers under Sections 205 and 206 of Part II of the Act (R. 2799).

After an application to the Federal Power Commission for a rehearing of its rate order had been denied, petitioner filed a Petition for Review in the United States Court of Appeals for the Third Circuit (R. 4478-86).

The Court of Appeals affirmed the order of the Commission in its entirety. It held that petitioner was subject to regulation by the Commission both as a licensee under Part I of the Federal Power Act, because the states of Maryland and Pennsylvania had failed to agree on regulation, (R. 4585) and also as a "public utility" under Part II of the Act (R. 4566).

Specification of Errors to Be Urged

The court below erred:

(1) In holding that a licensee, the owner of a hydroelectric project constructed under license from the Federal Power Commission and subject to regulation under Section 20 of Part I of the Federal Power Act, is also subject to regulation as a "public utility" under Part II of the Act.

(2) In holding that in a proceeding brought under Section 20 of the Federal Power Act the Commission is not required to apply the formula set forth in Section 3(13) of the Act in order to arrive at a rate base, and in failing to hold that the Commission's purported application of such formula was incorrect.

(3) In holding that the mere failure of the State of Maryland to attempt to come to an agreement with the State of Pennsylvania on cooperative regulation of petitioner's rates constituted inability to agree within the meaning of the statutory requirement of Section 20 of the Act.

(4) In failing to set aside the order of the Federal Power Commission.

Reasons for Granting the Writ

This is a case of first impression in that the court below is the first court that has been called upon to pass upon the basic question of whether the provisions of Part II of the Federal Power Act are applicable to licensees who are subject to regulation under Part I. We urge that the writ be granted for four reasons:

A. The effect of the decision below, construing Part II of the Federal Power Act to be applicable to licensees, is of great importance because it vitiates the contracts all licensees have heretofore made with the Federal Power Commission providing for the regulation of rates solely in accordance with the provisions of Section 20 of Part I, thus ignoring the statutory prohibitions against alteration or amendment contained in Sections 6 and 28, and because it permits dual regulation of the same rates—by the states under Part I and by the Federal Power Commission under Part II.

B. The decision below, construing Section 20 of the Federal Power Act so as to permit regulation of the rates of licensees by the Federal Power Commission under both Part I and Part II of the Act, is at variance with the views expressed by the Court of Appeals for the Second

Circuit (*Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d, 787, 792, 793) and by the Court of Appeals for the District of Columbia (*Alabama Power Co.* v. *Federal Power Commission,* 128 F. 2d, 280, 293).

C. The decision below, in failing to decide the correct formula to be applied in the determination of "net investment" as that term is defined in Section 3(13) of the Federal Power Act, leaves undetermined an important question of statutory construction affecting all proceedings brought under Section 20 of the Act.

D. The decision below, in construing the mere failure of the State of Maryland to attempt to engage in cooperative regulation of petitioner's rates with the State of Pennsylvania as constituting an inability of the states to agree so as to confer regulatory jurisdiction on the Federal Power Commission, is a misinterpretation of the language and intent of Section 20 of the Act.

Argument

1. From the legislative history of the Federal Water Power Act of 1920, under which petitioner's license was issued, it is abundantly clear that the purpose of the legislation was to promote the development of the nation's water power resources by private investment (*Grand River Dam Authority* v. *Grand Hydro,* 335 U. S. 359, 372, 69 S. Ct. Rep. 114). At the time of its passage, because of legal uncertainties, hydroelectric construction in this country was virtually at a standstill and Congress was determined to end all such uncertainties so that private capital might be tempted to develop the nation's valuable water power resources.

To accomplish this avowed purpose, the Act provided for the development of the nation's water power resources

by "licensees" who would accept from the Government a contract,[2] termed a license, which specifically embodied in the contractual obligations all the terms and conditions of the Act and all the rights and obligations of the licensee to the United States (Section 6). Furthermore, although the Act might be amended, no such amendment could affect the terms of any license previously issued or the rights of any licensee thereunder (Section 28).

This contractual relationship was deemed to be the most satisfactory way of encouraging investment and yet safeguarding the national interest (*First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U. S. 152, 180, note 3, 66 S. Ct. Rep. 906). For, while it guaranteed certainty as to tenure of occupancy during the term of the license, it also guaranteed certainty of obligations and responsibilities, including the price of recapture and the regulation of rates.

Since the Water Power Act was primarily a conservation measure and not a regulatory one, it was deemed advisable to leave the control of rates to the responsibility of the states in which licensees might operate.[3] For this reason, it was provided in Section 20 that in the case of licensees engaged in interstate operations, the Federal Power Commission would have jurisdiction over rates only in the event that the states had not discharged their responsibilities by appointing duly constituted commissions, or in the event that the states concerned were unable to agree. The extent of the Federal power was, therefore, though limited, expressly defined.

In addition, as a further indication of the desire to embody within the license contract all the conditions and obligations to be involved, Section 20, by incorporating

[2] Cf. Hearings before the Committee on Water Power, House of Representatives, 65th Cong., 2nd Sess. (1918), pp. 29-30, 102-3.
[3] ibid pp. 99-100.

the provisions of Section 14, undertook to define the rate base to be employed as "net investment" or "fair value", whichever was lower.

Part II of the Federal Power Act, on the other hand, is a purely regulatory measure. It authorizes the Commission to regulate the wholesale rates of certain "public utilities" engaged in interstate commerce but it limits the jurisdiction of the Commission "to those matters which are not subject to regulation by the states (Section 201(a)). Since the rates of licensees were already, in the first instance, made subject to state regulation under the provisions of Part I of the Act, it seems difficult to assume that Congress intended to superimpose dual regulation by the Federal Power Commission under Part II. Furthermore, the term "public utility" is defined in Part II as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part". The jurisdiction of the Commission over the facilities of licensees is provided in Part I.[4] That jurisdiction, furthermore, is not only statutory, but contractual.

In short, it is impossible to construe the provisions of Part II as being applicable to licensees without ignoring (1) the provisions of Part I requiring the regulation of the rates of licensees by the states concerned, (2) the contract relationship between licensees and the Commission embodying in the license contract the terms of the Act at the time the license was issued, and (3) the plain language of Part II limiting its application to matters beyond the sphere of state control and even then only to "public utilities" referred to in that Part.

The Commission has conceded in its brief filed in the court below that an irreconcilable conflict exists if a licensee should be simultaneously subject to regulation by

[4] Cf. Dissenting opinion of Commissioner Draper (R. 2791-92).

the states under Section 20 and by the Federal Power Commission under Part II. It seeks to resolve the conflict by ousting the states of any jurisdiction whatever. It argues, first, that in view of the decision in *Public Utilities Commission* v. *Attleboro Company,* 273 U. S. 283, the states lack the power to regulate interstate wholesale rates and that Section 20 therefore must be construed to apply only to retail rates. In the alternative, it suggests that Section 20 of the Act must be held to have been repealed by implication with the enactment of Part II.

The court below rejected both arguments advanced by the Commission, but nevertheless upheld the Commission's jurisdiction under Part II on the ground that the regulatory provisions of Section 20, read without the reference to the "net investment" rate base, are so similar to those contained in Part II that it becomes immaterial whether the proceeding is brought under Section 20 or under Part II. We believe all three arguments are demonstrably unsound.

The suggestion that the *Attleboro* decision precludes state regulation was rejected by the Court of Appeals in the first *Safe Harbor* case (128 F. 2d 800) which construed Section 20 to constitute Congressional consent to cooperative regulation by the states. Certiorari was denied by this Court. There is nothing in the *Attleboro* decision that would suggest that Congress lacks the power to confer regulatory jurisdiction upon the states, as was done in Section 20 of the Act.

As the Court of Appeals pointed out in its former opinion, the Compact Clause of the Constitution requires no specific or formal language to evidence the consent of Congress to the making of agreements or contracts between states. The language of Section 20 of the Act is quite adequate to indicate Congressional consent to the

regulation of a licensee's interstate rates by agreement between the states concerned.

The argument in favor of repeal by implication also lacks persuasion. It is of course axiomatic that repeals by implication are not favored. (*United States* v. *Jackson,* 302 U. S. 628, 631, 58 S. Ct. Rep. 390; *United States* v. *Borden Company,* 308 U. S. 188, 198, 60 S. Ct. Rep. 182.) In addition, the suggestion is at variance with the purpose of Part II of the Federal Power Act of 1935 as evidenced by its legislative history. The sponsors and draftsmen of the Act stated repeatedly that there was no intent in Part II to remove from the sphere of state control any powers then being exercised but only to supplement Federal regulation in the sphere where the states were powerless to act.[5] Thus to hold Section 20 repealed by implication is to oust the states by judicial decision from powers theretofore conferred by legislative enactment.

Furthermore, the statutory scheme of the 1935 Act, by segregating in separate parts the provisions relating to licensees from those relating to public utilities, is inconsistent with the theory that anything in Part II may be deemed to repeal any provision of Part I by implication. It is noteworthy that the term "licensee" nowhere appears in Part II whereas in the procedural and administrative provisions of Part III, the terms, "licensee" and "public utility" both appear. The repeated and careful differentiation between "licensees" and "public utilities" throughout the 1935 Act is certainly indicative of congressional intent to segregate the regulatory powers of the Commission over each class. Had Congress intended licensees to become subject to the provisions of Part II, it seems obvious that it would have so stated specifically.

[5] H.R. No. 1318, 74th Cong., 1st Sess. (1935), p. 8; Hearings on Senate Bill S-1725, Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935), pp. 233-34.

Although the court below, as stated above, rejected the Commission's contentions, the rationale of its decision is equally untenable. We have heretofore asserted that the purpose of the Federal Water Power Act was to dispel all uncertainties and define for the term of the license all the licensee's liabilities and responsibilities vis-a-vis the Government. In the matter of rate regulation, the two most significant questions are, of course, first, what body shall possess the regulatory authority and, second, what should be the basis of regulation.

Section 20 of the Act answers both questions. It confers jurisdiction in the first instance upon the states and provides that the rate base shall be that prescribed in Section 14 of the Federal Power Act which is "net investment" as that term is defined in Section 3(13) of the Act.

The court below, however, has construed the language of Section 20 merely to provide a limit for valuation pointing out that Section 20 recites that in the valuation of the property of a licensee for rate-making purposes, "no value shall be claimed by the licensee or allowed by the commission for any project * * * under license in excess of the value * * * prescribed in section 14 hereof for the purposes of purchase by the United States * * *."

When Section 20 is read in the light of the legislative history of the Act, there can be no doubt that it was intended that the rate base to be used in proceedings brought under that Section was to be net investment or fair value, whichever is the lower.[6] This is consistent with the primary aim of the Act to define with certainty all the provisions of the license contract. Since the only types of rate base mentioned in the act are net investment

[6] Cf. Hearings before the Committee on Water Power, House of Representatives, 65th Cong., 2nd Sess., (1918), p. 701; Cong. Rec., 65th Cong., 3d Sess., Vol. 57, Part V, p. 4638.

or one based on fair value, it is apparent that Congress intended prospective investors to be assured that the base to be used for rate-making would be net investment unless fair value was lower.

There is no suggestion that the base the Commission used in this case was fair value or that the fair value would be lower than net investment. In fact, petitioner's offer of proof of fair value was rejected and the rate base employed was original cost less accrued depreciation, as found by the Commission. Petitioner's proof would have indicated that the fair value today of its project far exceeds its cost or the "net investment" (R. 150-155, 2760-61).

Furthermore, the effort of the court below to reconcile the regulatory provisions of Section 20 of Part I of the Act with those contained in Part II fails to resolve the conflict between state and federal control. Whatever may be determined as to the type of rate base required by Section 20, it remains clear that the Section provides for rate regulation in the first instance by the states and by the Federal Power Commission only in the event that the states are unable to agree. This was the decision of the Court of Appeals for the Third Circuit in the first *Safe Harbor* case. If the present decision of the court below is correct, however, the Federal Power Commission, under Part II, will have jurisdiction to regulate the rates of licensees whether or not there is disagreement between the states concerned, and the provisions of Section 20 will be rendered wholly nugatory.

In certain instances, too, the result might be dual and conflicting regulation, for the states might well agree upon the regulation of a licensee's rates, acting under Section 20, while at the same time, the Federal Power Commission might issue an independent and conflicting rate order,

acting under Part II. It is, of course, true and the Commission has so conceded in its brief below, that the very nature of rate regulation requires control by a single authority. The decision of the court below, nevertheless, permits regulation by two authorities. It is hard to believe that in enacting Part II of the Act, Congress had this result in mind. In any event, the importance of the question seems apparent and the necessity for its final determination warrants the granting of this Petition.

Finally, it may be noted that the opinion of the court below clearly indicates that the question is a difficult one, and the solution suggested is the result of an apparent intellectual struggle. The court conceded that its decision was inconsistent with the dicta of two other Courts of Appeals and, in fact, at variance with the views it expressed in the first *Safe Harbor* case (R. 4577). That decision, the court noted, "squints" in the other direction. Also, it may be added that the court below virtually invites review in that it is announced that the determination of jurisdiction under Part I is made only because the "reviewing court" might differ with the views expressed upholding federal jurisdiction under Part II (R. 4578).

2. The court below conceded that its construction of Section 20 is at variance with the dicta of the Court of Appeals for the Second Circuit in *Niagara Falls Power Co.* v. *Federal Power Commission,* 137 F. 2d, 787, 792, 793, and the Court of Appeals for the District of Columbia in *Alabama Power Co.* v. *Federal Power Commission,* 128 F. 2d, 280, 293 (R. 4577). Both those courts have stated that Section 20 requires the application of a net investment rate base, and the Court of Appeals for the District of Columbia has also indicated that it believes that licensees are subject to regulation exclusively under Part I of the Act.

In the *Niagara Falls* case, Judge Learned Hand stated that "net investment" is "the base upon which its rates are to be calculated if it ever engages in interstate or foreign commerce, §20, 16 U.S.C.A. §813" and that "* * * that definition applies throughout the Act whenever 'net investment' or 'original cost' appears".

In the *Alabama Power Company* case, the court declared: "And the Power Commission, in making valuations for purposes of rate regulation of public utilities—not its licensees—is governed, also, by a different formula than when it makes valuations of the property of a licensee. The formula for valuation of properties of licensees, for rate making purposes, is contained in the provisions of sections of the 1920 Act, which were incorporated into Part I of the Federal Power Act of 1935. Part II of the Power Act is that which deals with public utilities subject to the control of the Federal Power Commission, by reason of being engaged in distribution of electric power in interstate commerce."

In the two cited cases, the courts were considering the "actual legitimate original cost" of the project properties involved for the purposes of determining the legality of the accounting adjustments required by the orders of the Commission. Since under the definition of Section 3(13) the actual legitimate original cost is the primary element in determining "net investment", the views expressed by these two courts carry great significance. Furthermore, although both licensees involved in the two cases were subject to rate regulation by the states in which they operate, if for any reason the utility commissions in such states should cease to exist or cease to have regulatory jurisdiction over the licensees, the Federal Power Commission would have jurisdiction to regulate rates. In consequence, the two courts recognized that

their determination of "actual legitimate original cost" would be the principal element of the "net investment" in the event rate proceedings were ever brought by the Federal Power Commission. The clear expression of opinion by two courts that "net investment" rate base is required in proceedings under Part I of the Federal Power Act therefore amounts to more than mere dicta and establishes a direct conflict, if not in the decisions, at least in the views, of these courts with the determination of the court below.

We submit that this conflict should be resolved. The correct determination of a rate base is of too great importance to remain in the field of indecision.

3. As is indicated by the opinion of the court below (R. 4565), the Commission asserted its jurisdiction over petitioner's rates under both Parts I and II of the Act and took the position that the rate base it applied, consisting of the original cost less accrued depreciation, constituted petitioner's "net investment" as that term is defined in Section 3(13).

Petitioner contended that it is clear from the definition in Section 3(13) that depreciation may be deducted from original cost to arrive at "net investment" only "if and to the extent that" it has been "accumulated during the period of the license from earnings in excess of a fair return * * *." In petitioner's view, the word "earnings" is used in the Act in the accepted sense in which it is used in accounting circles—*i.e.* the excess of income over all operating expenses including annual depreciation expense.

Petitioner contends, therefore, that in order to determine whether depreciation has been accrued out of earnings in excess of a fair return, it is necessary first to

determine what is a fair return for each year during the license period, and then to determine whether petitioner's income after all operating charges, including depreciation expenses for the year, exceeds that sum. To the extent that the income does so exceed that sum, a portion of the depreciation expense may be deemed to be accumulated out of earnings in excess of a fair return.

The Commission, on the other hand, contends that depreciation must be deemed to have been accrued out of earnings in excess of a fair return within the meaning of Section 3(13) if petitioner's income after all operating charges, *except* depreciation expense, provides a fair return. Contrary to the decisions of this Court since *Knoxville* v. *Knoxville Water Company,* 212 U. S. 1, 13, 29 S. Ct. Rep. 148 (1909), the Commission fails to recognize depreciation as an operating expense prior to the determination of earnings or profits.

The court below deemed it unnecessary to determine this question since it had reached the conclusion that Section 20 of the Act does not require the application of the Section 3(13) formula in arriving at a rate base (R. 4588-89). If this petition is granted and this court should determine that Section 20 of Part I of the Act, by incorporating the provisions of Section 14, does provide that in rate proceedings under Section 20 the rate base must be either the lower of "net investment" or "fair value" as specified in Section 14 of the Act, it will become important for this Court to determine the correct application of the formula set forth in Section 3(13). Accordingly, petitioner will urge the merits of its position taken before the court below as briefly outlined above and described in the opinion of the court below (R. 4586-4592). Petitioner will also urge that the application of a 5% rate of return to a depreciated base, in the

case of Safe Harbor, produces an "end result" that is clearly confiscatory. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 64 S. Ct. Rep. 281 (1944). Safe Harbor is a static project. As it cannot reinvest its depreciation reserve in plant, the reserve must be kept intact in low-interest bearing securities or cash. In consequence under the ruling of the court below Safe Harbor will receive a far less return on its project investment than even the inadequate 5% the Commission purported to allow.

4. It is plain from the record that in affirming the Commission's finding that the states of Maryland and Pennsylvania are unable to agree the court below regarded a mere failure on the part of Maryland to make any effort towards cooperative regulation with Pennsylvania as synonymous with an inability to agree. We submit this constitutes a misinterpretation of Section 20 of the Act which clearly requires a showing of *inability*, and not mere failure, to agree as a prerequisite to the exercise of rate regulatory powers by the Federal Power Commission.

There was clearly no evidence, much less substantial evidence as required by Section 313 of the Act, of inability to agree. At best there was evidence that the states had failed to agree because Maryland chose to circumvent the Act by urging the Federal Power Commission to act in the interests of expediency.

Examination of the only evidence in the record before the Commission upon which its finding of disagreement between the states was based discloses two letters, both quoted by the court below (R. 4579-82). The first is signed by four attorneys who describe themselves as "counsel for certain intervenors in an investigation now pending before the Maryland Public Service Commission of the rates for electric service charged by the Consolidated Gas

Electric Light and Power Company of Baltimore." It obviously cannot be regarded as an expression of the policy of the state of Maryland.

Furthermore, it recites the understanding of the wri ers that "joint hearings with regard to these rates are contemplated by the Maryland and Pennsylvania commissions". It requests action of the Federal Power Commission in view of its "clearer jurisdiction" and "superior facilities for making these determinations". Patently this letter evidences no inability of the states to agree.

The other letter is from the Chairman of the Maryland Public Service Commission and recites in part, *"while the state commissions are ready to engage in cooperative regulation* and the opinion of the Circuit Court [*i.e.,* in the first *Safe Harbor* case] indicates state jurisdiction, • • • we understand that the Federal Power Commission is prepared to pursue the matter to a conclusion in much less time than probably would be required by state action."

In other words, the suggestion of the Maryland Commission is merely that the statutory procedure required by the Federal Power Act be ignored in the interests of expediency. It cannot be construed as inability to agree, since readiness to engage in cooperative regulation with Pennsylvania is admitted. That Pennsylvania has at all times taken the position that it is ready to cooperate with Maryland is conceded in the court's opinion (R. 4584).

It should be evident that in conferring authority upon the states to regulate the interstate rates of licensees by agreement Congress intended that an actual effort to agree should be made. The opinion of the court below permits the representatives of the public utility commission of *one* state, irrespective of the avowed willingness of the other state to cooperate, to invalidate the purpose of the statute merely because such state deems it expedient. In addition,

it ignores the statutory command that findings must be supported by substantial evidence. (Sec. 313(b) Federal Power Act, 49 Stat. 860, 16 U.S.C. 825 l; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 229, 59 S. Ct. Rep. 206.)

Finally, even if it should be determined that the statutory requirement of inability to agree has been met by the mere failure of the State of Maryland to make any effort to agree with the State of Pennsylvania, the decision of the court below should be reversed because (1) whatever jurisdiction the Commission has over petitioner's rates is derived from Section 20 of Part I of the Federal Power Act, (2) Section 20 requires the application of a "net investment" rate base and (3) the Commission incorrectly applied the formula of Section 3(13) in purporting to determine the "net investment" of petitioner for rate-making purposes.

CONCLUSION

It is important that this Court resolve all doubts as to the applicability of Part II of the Federal Power Act to licensees, and as to the respective powers of the Federal Power Commission and the state commissions over rates of licensees. It is further important that this Court determine the rate base which may be applied in proceedings under Section 20 of Part I of the Federal Power Act. For these reasons it is respectfully requested that this Writ of Certiorari be granted.

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March 27, 1950.

APPENDIX

Excerpts from the Federal Power Act

"SEC. 3. The words defined in this section shall have the following meanings for purposes of this Act, to wit: * * * (13) 'net investment' in a project means the actual legitimate original cost thereof as defined and interpreted in the 'classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission', plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. * * *

"SEC. 14. Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, * * * upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered

into by the licensee with the approval of the Commission. * * *

"SEC. 20. That when said power or any part thereof shall enter into interstate or foreign commerce the rates charged and the service rendered by any such licensee, or by any subsidiary corporation, the stock of which is owned or controlled directly or indirectly by such licensee, or by any person, corporation, or association purchasing power from such licensee for sale and distribution or use in public service shall be reasonable, nondiscriminatory, and just to the customer and all unreasonable discriminatory and unjust rates or services are hereby prohibited and declared to be unlawful; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State or to regulate and control the amount and character of securities to be issued by any of such parties or such States are unable to agree through their properly constituted authorities on the services to be rendered or on the rates or charges of payment therefor, or on the amount or character of securities to be issued by any of said parties, jurisdiction is hereby conferred upon the commission, upon complaint of any person aggrieved, upon the request of any State concerned, or upon its own initiative to enforce the provisions of this section, to regulate and control so much of the services rendered, and of the rates and charges of payment therefor as constitute interstate or foreign commerce and to regulate the issuance of securities by the parties included within this section, and securities issued by the licensee subject to such regulations shall

be allowed only for the bona fide purpose of financing and conducting the business of such licensee.

The administration of the provisions of this section, so far as applicable, shall be according to the procedure and practice in fixing and regulating the rates, charges, and practices of railroad companies as provided in the Act to regulate commerce, approved February 4, 1887, as amended, and that the parties subject to such regulation shall have the same rights of hearing, defense, and review as said companies in such cases.

In any valuation of the property of any licensee hereunder for purposes of rate making, no value shall be claimed by the licensee or allowed by the commission for any project or projects under license in excess of the value or values prescribed in section 14 hereof for the purposes of purchase by the United States, but there shall be included the cost to such licensee of the construction of the lock or locks or other aids of navigation and all other capital expenditures required by the United States, and no value shall be claimed or allowed for the rights granted by the commission or by this Act. * * *

"SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. * * *

"SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *"